IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIZABETH BARBER, et al, *on behalf of themselves and all others similarly situated*, *Plaintiffs*, vs. ELISABETH DEVOS, *in her official capacity as United States Secretary of Education*, and UNITED STATES DEPARTMENT OF EDUCATION, *Defendants.*	Case No. 20-cv-1137-CJN

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION TO STAY CONSIDERATION PURSUANT TO RULE 56(d)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

OTHER

INTRODUCTION

More than four months ago, as part of emergency legislation providing immediate economic relief because of the COVID-19 pandemic, Congress and the President prohibited Defendants Secretary Elisabeth DeVos and the U.S. Department of Education (collectively, the "Department") from garnishing wages of defaulted student loan borrowers until October 1, 2020. *See* Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136 (the "CARES Act") § 3513(e).[1] Now, nearly 70% of the way through the emergency period, the Department concedes its failure to fully comply with the law: as of July 9, at least 2,574 borrowers who should have found temporary relief from the CARES Act continued to see their wages garnished; by July 23, that number had grown to 2,886.[2] The problem is not resolved—over the last two weeks it has gotten worse. As to that material fact, there is no dispute.

---

[1] It is possible that the CARES Act relief period (including the wage garnishment suspension period) will be extended through new legislation or executive action. At a press briefing on July 30, 2020, the President stated: "We also suspended student loan payments for six months, and we're looking to do that additionally and for additional periods of time." *See* Michael Stratford, "Trump eyes student loan relief extension," Politico (July 30, 2020), *available at:* https://www.politico.com/news/2020/07/30/student-loan-relief-extension-389062. In addition, on May 15, 2020, the U.S. House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions Act, or HEROES Act, H.R. 6800, which included extension of the CARES Act's suspension of involuntary collection related to student loans, including wage garnishment.

[2] The Department has provided percentages of ongoing garnishees, along with a total of individual garnishees as of March 13, but does not disclose the total number of ongoing garnishments. On May 11, 2020, the Department stated that "[a]s of March 13, 2020, there were approximately 390,000 borrowers subject to wage garnishment." Dkt. 14 at ¶ 2. Using this disclosure as a baseline, for the week ending July 9, 2020, approximately 2,574 borrowers (0.66% of 390,000) were still being garnished. *See* Declaration of Joe Lindsey ("Lindsey Decl."), Dkt. 27-2 ¶ 10. For the week ending July 23, 2020, that number increased to 2,886 (0.74% of 390,000). Dkt. 29 at 2. This increase roughly mirrors the increased number of individual employers with one or more employees subject to garnishment. *Compare* Lindsey Dec. ¶ 10 (2,147 employers as of week ending July 9) *with* Dkt. 29 at 2 (2,424 employers as of week ending July 23).

Rather than accept its failures and concede the illegality of its conduct, the Department foists responsibility on every conceivable actor but itself: borrowers, employers, Plaintiffs' counsel, and even Congress. *See* Mem. in Supp of Defs.' Mot. to Dismiss or, in the Alt., for Summ. J (Dkt. 27-1) ("Def. Br.") at 1 (suggesting that the failure to provide refunds is because borrowers have not provided information to the Department); *id.* at 2 ("That not all garnishments have ceased lies at the doors of the employers, not the Department."); *id.* at 1 (suggesting that Plaintiffs' counsel should be doing more to identify borrowers who are having their wages garnished); *id.* at 18 (asserting that "[the wage garnishment] system was set up by Congress, not the Department"). None of this excuses the Department from complying with the mandate in the CARES Act that *the Secretary* stop garnishing borrowers' wages—stop taking money from beleaguered workers in the midst of a pandemic.

At the same time, the Department insists—thousands of continuing garnishments notwithstanding—that it is in full compliance with the CARES Act. *See* Def. Br. at 18 ("Congress did not intend that the Secretary do more than she has to date, which is to issue instructions to all employers to stop withholding wages."). Indeed, since at least May 14 (when the Department was still garnishing wages of approximately 54,000 borrowers), the Department has appeared satisfied with its minimal efforts. *See* Dkt. 17 at 4-5 ("Defendants have not only taken the actions required by law to effectuate the suspension of wage garnishments but have also gone further by instructing employers again through multiple means of communication and providing borrowers with the information necessary to empower them to push their employers to comply with the Department's instructions."). Absent an order requiring the Department to actually *suspend* all wage garnishments as required by the CARES Act, the Department believes that it "has no further responsibility," Def. Br. at 17, and can simply walk away.

Not only has the Department failed to meet the law's basic requirement—*i.e.*, to stop seizing money from paychecks—it has similarly failed to refund large sums of the money it has taken (and continues to take) during the emergency period. Indeed, the number of borrowers owed refunds decreased from approximately 21,000 on June 2 (Dkt. 23 at ¶ 10) to 19,000 by July 9 (Dkt. 26 at 3), but then increased to 22,000 as of July 27 (Dkt. 29 at 3). The Department remarkably asserts that it has no responsibility here either. It claims that its failure to provide refunds to nearly 22,000 borrowers is of no legal consequence because "refunds [of wages seized in violation of the CARES Act] are not required by the CARES Act." Def. Br. at 9. This is tantamount to arguing that, because Congress assumed the Department's compliance with the law, the Department bears no consequence for breaking it. The Department is not above the law.

The Department now moves to dismiss under Federal Rule of Civil Procedure 12(b)(1), contending that Plaintiffs' claims are moot. To the contrary, as demonstrated below and in Plaintiffs' class certification filings, *see* Dkt. 22 at 2-5, the "inherently transitory" exception to the mootness doctrine establishes that their claims are live.

The Department also moves to dismiss under Federal Rule of Civil Procedure 12(b)(7) on the ground that Plaintiffs have failed to join employers as necessary parties. Employers are not necessary parties, however, because the plain language of Section 3513(e) of the CARES Act requires *the Secretary*—not employers—to suspend administrative wage garnishment. And even if employers were necessary—which they are not—the Department concedes that it is not feasible to join them and provides no basis under Rule 19(b) to dismiss the case because they cannot be joined.

In addition, and in the alternative, to its Rule 12 motions, the Department also has moved for summary judgment under Rule 56, asserting it has taken sufficient steps towards CARES Act

compliance, even though there is no dispute that garnishments are continuing and refunds remain outstanding. But those facts alone make clear that summary judgment is not properly granted in the Department's favor and that its motion should be denied. Nevertheless, should the Court agree with the Department that this case turns on the extent of the Department's effort to comply with the CARES Act, rather than the undisputed and insufficient results of those efforts, the Department's motion is premature. For this reason, in the alternative to denying the Department's motion on the basis of the undisputed facts, Plaintiffs are filing a Rule 56(d) motion requesting that the Court stay the Department's motion for summary judgment and issue a scheduling order for the Department to produce the administrative record, and for Plaintiffs to take discovery.

ARGUMENT

I. Plaintiff's Claims are not Moot

Reprising its argument opposing Plaintiffs' motion for class certification, Dkt. 20 at 13-16, the Department contends that this case must be dismissed because it has stopped garnishing Named Plaintiffs' wages, Def. Br. at 14, has provided refunds to Named Plaintiffs, *id.*, and has a "commitment to ending garnishment" for the over 2,800 members of the class whose wages it concedes are still being garnished, *id.* at 15.[3] But as Plaintiffs demonstrated in their class certification briefing, *see* Dkt. 22 at 2-5, the "inherently transitory" exception to the mootness doctrine allows a case to continue where, as here, the named plaintiffs' claims are likely to resolve before the Court reasonably can be expected to rule on class certification. Such cases remain live because the issues still require resolution for myriad remaining class members. In

[3] This number is simply a snapshot of the live garnishments as of the week ending July 23, 2020. Dkt. 29 at 2. The Department concedes that it does not know the true number of live garnishments. Defs.' Statement of Material Facts (Dkt. 28) ¶¶ 24-25.

this case, the Department's admission—74 days after Plaintiffs filed their amended motion for class certification—that thousands of borrowers' wages are *still* being garnished, by itself proves that the exception should apply in this case.

The "inherently transitory" exception is recognized for class action claims that "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *see also Cty. of Riverside v. McLaughlin,* 500 U.S. 44, 51-52 (1991); *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975) ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion."). The exception applies when "the individual claim might end before the district court has a reasonable amount of time to decide class certification, and . . . *some class members will retain a live claim at every stage of litigation*." *J.D. v. Azar*, 925 F.3d 1291, 1311 (D.C. Cir. 2019) (emphasis added). "Where a live controversy exists for class members, mootness alone does not render the named Plaintiffs inadequate." *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Pompeo*, No. 18-CV-01388 (TSC), 2020 WL 590121, at *12 (D.D.C. Feb. 5, 2020) (citing *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977)).

The Department argues that Plaintiffs cannot satisfy the second *Azar* prong, that there are "some class members [who] will retain a live claim at every stage of litigation." *Azar*, 925 F.3d at 1311; Def. Br. at 15. But the Department admits that nearly four months into the CARES Act's six-month emergency period, there are over 2,800 class members who currently have live claims. Lindsey Decl. ¶ 10; Dkt. 29 at 2. And the Department concedes that it "cannot directly determine when an employer has canceled garnishment for its employees with federally-held

student loans." Dkt. 28 ¶ 24 (citing Declaration of Mark Brown ("Brown Decl."), Dkt. 20-1, ¶ 40). Rather than resolve or propose a solution for the continuing illegal garnishments, the Department offers only its hopes and expectations that someday soon the number will "shrink to zero." Def. Br. at 15.

The Department presented the same wishful thinking in early June, when it asserted that its "goal and expectation" was that "any remaining garnishments will soon cease" and that all individuals will be provided refunds. Dkt. 20 at 15. Likewise, it asserted that "there is no certainty that there will continue to be class members with live claims as the litigation progresses—indeed the hope is to the contrary." *Id.*

As the thousands of live claims show, this purported "commitment" has not been realized. *Azar* and its progeny do not allow the Department to elide the existence of 2,800 live claims on the basis of its "commitments," "goals," "expectations," or "hopes" that they will not be live at some uncertain point in the future. *Cf. Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, at *8 (D.D.C. Sept. 5, 2019) (finding that plaintiffs satisfy the second *Azar* prong based on evidence that thousands of members of the proposed class continued to suffer the harm at issue).

Moreover, the Department concedes that, over the last two *months,* the number of borrowers who are owed refunds has actually increased by approximately 1,000. *Compare* Dkt. 23 at ¶ 10 ("As of June 2, 2020, the Department reported that there were 21,000 borrowers without valid addresses on file.") *with* Dkt. 29 at 3 ("As of July 27, 2020, there were fewer than 22,000 borrowers without valid addresses on file. This number has increased over the last reported number as a result of the return of prior mailed refunds as undeliverable."). This alone is dispositive of the Department's Rule 12(b)(1) motion. Each of these 22,000 borrowers is a

member of the putative class. In every update to the Court since June 4, the Department has stated that it "continues work to validate addresses" for these borrowers, yet the problem has only grown worse. *See* Dkt. 23 ¶ 11; Dkt. 24, ¶ 5; Dkt. 26 ¶ 5; Lindsey Decl. ¶ 18; Dkt. 29 at 3. Clearly, the Department's approach is not working. The Department offers no plan for how, or timetable for when, these borrowers will receive refunds.

Perhaps recognizing that this failure alone defeats its Rule 12(b)(1) argument, the Department asserts for the first time that refunds are "not required by the CARES Act." Def. Br. at 2, 9, 16. Remarkably, the Department's position appears to be that it can illegally seize borrowers' wages without any obligation to return the stolen funds. This is tantamount to arguing that, because Congress assumed the Department's compliance with the law, it bears no consequence for breaking it. The CARES Act need not explicitly require refunds for borrowers to be entitled to them under the law. Indeed, throughout the life of this case the Department has agreed that it is responsible for refunds. *See, e.g.*, Dkt. 20 at 17 ("The Department does not contend that it is not largely responsible for ensuring that borrowers receive any refunds due them."); *see also* 34 C.F.R. § 34.28 (requiring prompt refunds when involuntary collection activity is "barred by law").

One fact remains clear: the Department has created a wage garnishment system that it can activate, but cannot turn off when the law requires it to do so. Despite admitting this fact repeatedly to other courts,[4] the Department asks this Court to dismiss the case based on the

[4] *See, e.g.,* Dkt. 17 at 5 (wherein the Department explains that it "cannot and does not control" the actions of employers and, by extension, cannot control its own wage garnishment process); *see also* U.S. Dep't of Educ., Sixth Monthly Compliance Report in response to ECF 130, *Manriquez v. Devos*, No. 17-cv-07210 (SK), Dkt. 205-2 at 10 (N.D. Cal. 2019) ("Since the employer is actually the one that garnishes wages, the Department does not have the capability to prevent employers from continuing to garnish wages following a stopped collection order.").

unfounded assumption that the putative class will "shrink to zero." Def. Br. at 15. Plaintiffs wish that were so and will readily concede mootness if garnishments stop. But not on this record.

II. Employers are Not Necessary Parties

Employers are not necessary parties under Rule 19(a) because, as explained above and in Plaintiffs' class certification reply brief, Dkt. 22, the plain language of Section 3513(e) of the CARES Act requires *the Secretary*—not employers—to cease involuntary collection, including a halt of administrative wage garnishment. CARES Act § 3513(e)(1) ("[T]he Secretary shall suspend all involuntary collection related to the loan, including . . . wage garnishment."). The Department fully recognizes this and has stated in this case that "it is true that the CARES Act requires *the Secretary* to suspend all wage garnishments[.]" Dkt. 20 at 17 (emphasis in original). The Department started the garnishment process and has the legal obligation to stop it. Employers are therefore not necessary parties in this action, and the Department's motion should be denied.

Even if employers were deemed necessary parties—which they are not—the Department concedes that it "would not be feasible to join all of these employers. " Def. Br. at 21. The Department argues instead that the case should be dismissed pursuant to Rule 19(b), which provides that, if a necessary party cannot be joined, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."

The factors for courts to consider when applying Rule 19(b) are:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;

> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. Pro 19(b). The Department does not come close to satisfying these factors.

The Department contends that the first and second factors warrant dismissal because "employers would be prejudiced by not being able to defend against an injunction, and there is no way to shape such an injunction as to protect their interests while also giving the putative class members the relief they seek." Def. Br. at 21. But the Department has not identified any "interests" employers have in an injunction against the Department, or how those "interests" would be harmed by this case. The only parties with a financial interest in wage garnishment are borrowers and the Department.

As for the third factor, a judgment rendered in the absence of employers would be adequate to protect the putative class. Most clearly, absent an order in this case requiring the Department to suspend wage garnishments, the Department's position is that it has done all it is obliged to do and can walk away. *See id*. at 17 (describing why, in the Department's view, it has "met [its] obligations regarding [wage garnishment] under the CARES Act" and "has no further responsibility"); *id.* at 18 (asserting that "Congress did not intend that the Secretary do more than she has to date, which is to issue instructions to all employers to stop withholding wages."). Yet according to the Department, proceeding without employers "would not further the public interest in settling the dispute as a whole because the [employers] would not be bound by the judgment in an action where they were not parties." *Id.* at 21-22. This ignores that the Secretary *will* be bound by such a judgment, and will be required, by both the law and the authority of this court, to suspend illegal garnishments.

As to the fourth factor, borrowers would not have an adequate remedy if the action were dismissed. The Department goes so far as to argue that borrowers are "far better situated" than the federal government to obtain the relief they are owed under the CARES Act because they can "sue their employers in state court." *Id.* at 22. Not only does this position ignore the Department's legal obligations under the plain language of the Act, but it is completely out of touch with borrowers' reality. The vast majority of borrowers in wage garnishment are low-income, struggling to support themselves and their families in the middle of a global pandemic. Rather than take responsibility for her failures, the Secretary attempts to foist all of the cost and responsibility onto the borrowers she is illegally garnishing, insisting that they use their time, energy, and resources—in these trying circumstances—to hire lawyers and risk their careers and professional relationships by suing the sources of their livelihood. The Department has offered no evidence that this is what Congress contemplated when it directed, without qualification, that the Secretary suspend wage garnishment of student-loan borrowers.

Finally, even if employers were necessary parties for stopping illegal garnishments, they are certainly not necessary for the Department to issue refunds of the amounts illegally garnished. *See* Am. Compl. (Dkt. 9) Request for Relief ¶ 7. The Department concedes as much. Dkt. 20 at 17 ("The Department does not contend that it is not largely responsible for ensuring that borrowers receive any refunds due them."). The Secretary attempts to get around this issue by claiming that refunds are not required under the CARES Act, but this argument, addressed above, has no merit. *See supra* at 7. Employers have nothing to do with ensuring that illegally seized funds are promptly returned to every member of the putative class.[5]

[5] The Department also contends that joinder is required notwithstanding Rule 19(d) because Rule 19 "is subject to Rule 23," and therefore "does not exempt class actions from

III. The Department is Not Entitled to Summary Judgment

In the alternative, the Department contends that it is entitled to summary judgment because it has "fully complied with [its] obligation under the CARES Act to 'suspend' all garnishments." Def. Br. 16. In short, the Department argues that, even though there are still thousands of live garnishments and outstanding refunds, because it has "sent notices to each employer instructing them to cease garnishment," and has "issued refunds for most of the payments garnished," it "has no further responsibility" under the law. *Id.* at 16-17.

As a threshold matter, the Department's motion for summary judgment should be denied based on the undisputed facts that the Department has not suspended wage garnishments for over 2,800 people, and that there are approximately 22,000 borrowers who are still owed refunds of illegal garnishments. Dkt. 29 at 2-3. The Department attempts to make this motion about the adequacy and reasonableness of its efforts to suspend garnishment and provide refunds, but those efforts are not relevant to whether the Secretary has in fact "suspended all involuntary collection related to the loan, including . . . wage garnishment." CARES Act § 3513(e)(1). Because the Secretary's statement of material facts reveal that she is out of compliance with the law, her motion should be denied.

To avoid this result, the Department offers a Hail Mary: that Congress's choice of the word "suspend" rather than "stop" "strongly suggests that Congress did not intend that the Secretary do more than she has to date, which is to issue instructions to all employers to stop withholding wages." Def. Br. at 17-18. This "strongly suggests" argument ignores the plain

---

dismissal for failure to join a necessary party." Def. Br. at 22. To the contrary, the cases cited by the Department stand only for the proposition that class actions are not entirely quarantined from the application of Rule 19. None suggest that the Court can deny class certification for failure to join indispensable parties, as the Department appears to be arguing. Plaintiffs address each of the cases cited by the Department in their class certification reply brief, Dkt. 22 at 7-8.

meaning of the word "suspend" which, according to Merriam-Webster's Dictionary, is "to cause to stop temporarily." Congress was instructing the Secretary to "stop temporarily" (i.e. during the six-month emergency relief period) all wage garnishments—not try, ***do***. The Department offers no support for the argument that Congress intended "suspend" to mean anything other than its ordinary definition. Nor could it, as Congress passed the CARES Act to provide immediate, actual relief to millions of student loan borrowers during the COVID-19 pandemic. *See, e.g.,* Dkt. 9 ¶ 29 ("Senator McConnell explained that the CARES Act 'puts urgently-needed cash in the hands of American workers and families. . . . That is what we have to do: Inject a significant amount of money as quickly as possible into households. . . . This bill would do just that—and do it fast."). If Congress intended for the Secretary to do anything less than stop garnishments temporarily during the emergency period, it would have so stated.

As a final attempt to evade responsibility, the Department claims that "the [wage garnishment] system was set up by Congress, not the Department." Def. Br. at 18. But Congress is not to blame for the Secretary's failure to suspend wage garnishments. Under the Debt Collection Improvement Act ("DCIA"), Congress authorized agencies to use administrative wage garnishment but left responsibility for devising the means of collection to the agencies. *See* 31 U.S.C. § 3711(a) (mandating that agencies "shall try to collect claims"); *id.* § 3720D (an executive branch agency "may" use wage garnishment procedures); *cf. id.* § 3711(d) (noting that when acting to collect claims pursuant to the DCIA, an agency is acting under "regulations prescribed by the head of the agency" and "standards that the Attorney General, the Secretary of the Treasury, may prescribe"). Similarly, although the Higher Education Act authorizes the Department to use administrative wage garnishment to collect amounts owed, it does not require the Department to do so. 20 U.S.C. § 1095a(a) (establishing that the Department "may garnish").

The Department implicitly concedes its role in implementing the wage garnishment system by citing not to these statutory provisions, but instead to its own regulations and policies to describe how the wage garnishment system works. *See e.g.*, Def. Br. at 6 (citing Department regulation 34 C.F.R. § 34.28 to explain when a borrower is entitled to a refund)); *Id.* (citing Department regulation 34 C.F.R. § 34.26 to explain the Department's process for ending wage garnishment); *Id.* at 9 (explaining that the Department's contractor, Maximus, developed the process for automating refunds). Congress did not direct the Department to set up a wage garnishment system that it could not turn off, that did not allow it to track the total number of borrowers it was garnishing, and that did not have sufficient contact information for borrowers. The flaws in the administration of the wage garnishment system reside with the Department, as does liability when as a result of those administrative flaws, the Secretary violates the law.

IV. In the Alternative, the Department's Motion for Summary Judgment is Premature and Should be Stayed Pursuant to Rule 56(d)

Were it actually the case that Congress intended for the Secretary only to make best efforts towards suspending wage garnishment, the adequacy of those efforts would be a question of fact for which there is not currently a sufficient record for the Court to decide summary judgment. The Department's motion for summary judgement is therefore premature because: (i) the Department has not produced the administrative record, let alone filed a "certified list of the contents of the administrative record," as required by Local Rule 7(n), and (ii) Plaintiffs have not had the opportunity to conduct discovery into the reasonableness or adequacy of the Department's efforts.

Cases challenging agency actions under the APA are to be resolved on the basis of an administrative record, and the responsibility to compile that record falls to the agency alone. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) ("The task of the reviewing court is

to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the *agency* presents to the reviewing court." (emphasis added)); *see also Ikossi v. Dep't of Navy,* 516 F.3d 1037, 1046–47 (D.C. Cir. 2008) (holding that the district court abused discretion in granting summary judgment where plaintiff lacked "key . . . testimony" and had only a "limited record" of administrative proceedings); *W. Virginia ex rel. Morrisey v. United States Dep't of Health & Human Servs*., No. CV 14-1287 (RBW), 2014 WL 12803229, at *2 (D.D.C. Nov. 3, 2014) ("[A]bsent the production of the administrative record, further summary judgment briefing in this matter would be premature."); *Styrene Info. & Research Ctr. v. Sebelius*, 851 F. Supp. 2d 57, 67 (D.D.C. 2012) ("[J]udicial review under the APA is confined to the 'full administrative record that was before the Secretary at the time he made his decision.'") (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

Also, the Department's motion is premature because the parties have not had an opportunity to conduct discovery. *See Convertino v. U.S. Dep't of Justice,* 684 F.3d 93, 99 (D.C. Cir. 2012) ("[S]ummary judgment is premature unless all parties have had a full opportunity to conduct discovery.") (internal quotations omitted). Pursuant to Rule 56(d), if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). To obtain relief under Rule 56(d), a party must: "(1) outline the particular facts [the party defending against summary judgment] intends to discover and describe why those facts are necessary to the litigation; (2) explain why the party could not produce those facts in opposition to the pending summary-judgment motion; and (3) show [that] the information is in

fact discoverable." *Jeffries v. Barr*, No. 17-5008, 2020 WL 3967833, at *6 (D.C. Cir. July 14, 2020) (internal quotations omitted). "Time for additional discovery should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence.'" *Convertino*, 684 F.3d at 99 (quoting *Berkeley v. Home Ins. Co.,* 68 F.3d 1409, 1414 (D.C. Cir. 1995)); *see also id.* ("Consistent with the salutary purposes underlying Rule [56(d)], district courts should construe motions that invoke the rule generously, holding parties to the rule's spirit rather than its letter.").

Plaintiffs satisfy each of these standards and are therefore entitled to discovery prior to a ruling on the Department's summary judgment motion. First, if the adequacy of the Department's efforts—as opposed to its actual fulfillment of its duty to suspend garnishments—is deemed the dispositive issue in the case, then Plaintiffs intend to discover the complete record of the Department's efforts to suspend wage garnishment and provide refunds, including through depositions of Department and Maximus officials with knowledge of those efforts. *See* Declaration of Alexander Elson ("Elson Decl.") ¶¶ 5-6 (describing the discovery that plaintiffs seek to take). This evidence is "necessary to the litigation" because it will shed light on the nature and extent of the Department's efforts and whether they have in fact been adequate or reasonable—as well as how (if at all) they have changed over time and whether they are continuing. *Id.* ¶ 7. The evidence will also reveal efforts the Department did not undertake, or that it considered and rejected.[6] Second, evidence to dispute the Department's facts is not yet available because there has been no opportunity to conduct discovery. Third, the complete record

[6] *See, e.g.,* Elson Decl. at ¶ 6(m) (explaining that Plaintiffs would seek discovery into why Defendants have not described any attempts in this case to reach employers by email after stating to the Washington Post in April that they have "been trying to speed things up by first calling and emailing employers") (citing Am. Compl. ¶¶ 40-41).

of the Department's efforts will be available in the Department's and Maximus's records, and through depositions of officials with knowledge.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny the Department's Motion to Dismiss or, in the Alternative, for Summary Judgment in its entirety. In the alternative, Plaintiffs request that this Court deny the Department's Motion to Dismiss and, pursuant to Rule 56, defer considering the Department's Motion for Summary Judgment until after the production of the administrative record and the completion of discovery, and issue any other appropriate relief.

Respectfully submitted,

By: /s/ *Alexander S. Elson*
Daniel A. Zibel (D.C. Bar No. 491377)
Eric Rothschild (D.C. Bar No. 1048877)
Alexander S. Elson (D.C. Bar No. 1602459)
National Student Legal Defense Network
1015 15th Street NW, Suite 600
Washington, DC 20005
(202) 734-7495
dan@defendstudents.org
eric@defendstudents.org
alex@defendstudents.org

Stuart T. Rossman* (BBO No. 430640)
Persis Yu* (BBO No. 685951)
National Consumer Law Center
7 Winthrop Square, Fourth Floor
Boston, MA 02110
P: (617) 542-8010
srossman@nclc.org
pyu@nclc.org

Attorneys for Plaintiff and Proposed Class
**Admitted pro hac vice*

Dated: August 3, 2020